OPINION OF MR ADVOCATE GENERAL TESAURO

delivered on 10 November 1993 *

Mr President,
Members of the Court,

1. By order of 10 September 1992, the Belgian Cour de Cassation asks the Court whether the European Organization for the Safety of Air Navigation (hereinafter referred to as 'Eurocontrol'), established by the Convention signed in Brussels on 13 December 1960 (hereinafter referred to as 'the Convention'), amended by the Brussels Protocol of 12 February 1981, is an undertaking within the meaning of Articles 86 and 90 of the EEC Treaty.

2. Referring to the Report for the Hearing for a fuller account of the relevant provisions and the facts of the case, I shall here confine myself to the aspects most directly relevant to our purposes.

Eurocontrol, which was assigned in particular the task of attending to the common organization of air navigation services within the air space of the contracting parties, [1] has actually performed that task only with respect to the Benelux countries and Northern Germany. The other Member States, unwilling to give up the exercise of such authority, have continued to control their respective air space on the basis of a decision of the Permanent Commission — a body composed of the representatives of the Member States — adopted on 28 January 1966.

The 1981 Protocol in essence adapted the regulations in the Convention to that situation, leaving however to the Contracting States the right to request Eurocontrol to manage facilities and services on their behalf (Article 2(2)(b)). It is precisely on that basis that Eurocontrol continues to provide, from its Maastricht centre, the services in question with respect to the Benelux countries and Northern Germany.

Among the tasks at present performed by Eurocontrol to be especially borne in mind are the establishment and collection of charges levied on the users of air navigation services, in accordance with the Multilateral Agreement relating to the Collection of Route Charges, on behalf of the contracting parties and the non-member States parties to that Agreement (Article 2(1)(l) of the Convention). The Member States of Eurocontrol, and also Austria and Spain, are parties to the Multilateral Agreement, which was signed in Brussels on the same date as the Protocol and which came into force on 1 January 1986.

The purpose of that Agreement was precisely to create a common system for establishing and collecting route charges for flights within the air space of the Member

* Original language: Italian.

1 — The original Contracting States were Belgium, Germany, France, Luxembourg, the Netherlands and Great Britain. At present Eurocontrol has 14 members: of the countries of the Community only Denmark, Spain and Italy do not belong to the organization.

States (Article 1(2)). The formula currently used to calculate those charges, established by the Permanent Commission of Eurocontrol (Article 3), is equal to the product of a rate per unit, set yearly by each Member State for the use of its own air space, for the number of service units corresponding to the part of the flight within the air space of the State concerned and is set by means of an algebraic formula taking account of the distance covered and the weight of the aircraft. To the charges thus calculated is then added an administrative rate, that is for a sum equivalent to the costs incurred in levying the charges.

Finally, it must be borne in mind that Eurocontrol settles for each flight the amount of route charges payable for journeys made and levies the total amount as a single charge (Articles 7 and 8), which, after deduction of the administrative rate, is then paid in its entirety to the States in question (Article 20). To enforce the collection of its debts, Eurocontrol may avail itself of the legal remedies available to each Contracting State.

3. This dispute arises from the refusal of the air navigation company SAT Fluggesellschaft mbH (hereinafter referred to as 'SAT') to pay Eurocontrol the route charges for flights made between September 1981 and December 1985.

In the proceedings before the Belgian courts, SAT asserted in particular that the procedure followed by Eurocontrol in fixing rates of a variable amount depending on the Member States and the years, for essentially equivalent services, constituted an abuse of a dominant position.

That argument, rejected by the courts at first and second instance, moved the Cour de Cassation to stay the proceedings and to refer to this Court a question concerning the interpretation of Articles 86 and 90 of the EEC Treaty.

4. As a preliminary point, and on the basis of the opinion of Professor Seidl-Hohenveldern, an international lawyer, Eurocontrol raises the objection that the Court lacks jurisdiction. It points out that it is an international organization subject to a legal order which is different from that of the European Community; relations between the two organizations are therefore governed by international law.

Eurocontrol relies, therefore, on the general principle '*par in parem non habet imperium*' (equals have no authority over one another), as applying to international organizations as well as to States, and it claims that any disputes arising between two international organizations should consequently be resolved, in accordance with general international law, by recourse to arbitration.

In the opinion of Eurocontrol, furthermore, the Court has no right either to interpret the Convention which established it or to ascertain whether its operations are incompatible with a provision of Community law. Nor, to establish the jurisdiction of the Court, can the principle of territoriality be relied on, by which, if an international organization operates within the territory of the Community,

it falls to the Court to establish whether its operations are incompatible with the relevant system.

5. The first argument is not relevant. The non-contentious nature of the Court's jurisdiction in proceedings for a preliminary ruling must be borne in mind. A reference made under Article 177 opens a parenthesis in the main proceedings, giving rise to a procedure 'from one court to another', as was correctly pointed out by the Commission at the hearing, a procedure that affects the situation before the Court of the parties to the main proceedings. Whilst the parties are heard in the written and oral stages in order to ensure that the rights of the defence are fully protected, they may not take any initiative or challenge the question that the national court has considered it necessary to put before the Court. [2]

The objection that the Court lacks jurisdiction ought therefore to have been raised, not before the Court but, if necessary, in the proceedings under way before the Belgian courts. Moreover, without discussing the merits of the problem relating to the limits of judicial review of the activity of an international organization, I must point out that the party affected by those limits is normally the defendant, while Eurocontrol is the plaintiff in the proceedings before the court making the reference.

6. Eurocontrol claims moreover that, since it operates within the ambit of a legal order different from that created by the EEC Treaty, it cannot in any case be subject to Community rules on competition. In that way the question of the organization's immunity is raised anew, from a different angle. For its part, the Commission maintains — also in the light of the Court's decisions — that, if Eurocontrol is to be regarded as an undertaking by virtue of its operations, there is no reason why Article 85 et seq. of the Treaty should not apply to it merely because it is an international organization.

I believe that opinion ought to be endorsed. It is clear from the case-law that, in defining the scope of the Community rules on competition, the Court gave priority, with respect to the subject in question, to considerations of an economic nature rather than to more strictly legal ones. That attitude was clearly expressed in the recent *Höfner* [3] judgment, in which it is explained how, 'in the context of competition law (...) the concept of an undertaking encompasses every entity engaged in an economic activity, regardless of the legal status of the entity and the way in which it is financed'. On the basis of that definition, the argument that the rules on competition should not be applied to the activities of an employment agency simply

2 — See in this connection the judgment in Case 44/65 *Hessische Knappschaft* v *Maison Singer et Fils* [1965] ECR 965, especially at pp 969-971; see also the judgment in Joined Cases 28, 29 and 30/62 *Da Costa en Schaake NV* v *Nederlandse Belastingadministratie* [1963] ECR 31, especially at pp 38-39.

3 — Case 41/90 *Klaus Hofner and Fritz Elser* v *Macrotron GmbH* [1991] ECR I-2010, in particular at paragraphs 21-23.

because they are carried on by a public entity was therefore disregarded in the case in point.

The judgment in question on the other hand represents the culmination of a line of decisions which is distinguished by the fact that it does not attribute importance to legal form in determining whether Articles 85 to 90 of the Treaty apply to a public entity. Equally significant in that regard is the judgment in *Commission* v *Italy*, [4] in which the Court was called on to rule on the concept of an undertaking within the meaning of Commission Directive 80/723 of 25 June 1980 on the transparency of financial relations between Member States and their public undertakings. That judgment, starting from the premise that the State may act either by exercising its public powers or by carrying on economic activities of an industrial or commercial nature, states that it is necessary to make a clear distinction between the role of the State as public authority and its role as proprietor. For the purposes of the application of that directive, it was held to be of no importance that the State carried on those economic activities by way of a distinct body or through a body forming part of the State administration; and precisely because of the activity carried on, the Italian Amministrazione Autonoma dei Monopoli di Stato, operating in the manufactured tobacco sector, was acknowledged to have the character of an undertaking, notwithstanding the fact that it was, from the legal point of view, integrated into the State administration.

In the light of those decisions as well, therefore, it seems to me that the fact that a body has the character of an international organization is not sufficient to prevent it from falling within the scope of the rules on competition. To say that is not to ignore different views as to the scope, as well as the basis, of the immunity from jurisdiction of international organizations, [5] but to point out the inadequacy of the proposition that ascribes absolute immunity to such organizations — even wider than the immunity of States, now generally confined to the typical features of State power, with the exception of so-called acts *jure gestionis* [6] — taking account, moreover, of the need not to deprive individuals of the protection afforded to subjective rights that might be impaired by the activities of international organizations, also in view of the growing number of organizations carrying on economic activities. [7]

7. The solution suggested above is indirectly confirmed by the question, raised by the French Government at the hearing, concerning the importance of the Court's answer as regards the nature of the activity carried on by Eurocontrol and the opportunity which

4 — Case 118/85 *Commission* v *Italy* [1987] ECR 2599, especially at paragraphs 6-10.

5 — See, among many, more recently and also for further bibliographical references, S. De Bellis, 'L'immunità delle organizzazioni internazionali dalla giurisdizione', Bari 1992.

6 — For an application of such a distinction with respect to countries that are not members of the Community, attention should be drawn in this connection to the decision of the Commission of 19 December 1984 concerning a proceeding under Article 85 of the EEC Treaty (IV/26.870 — Imports of aluminium from Eastern Europe, OJ 1985, L 92, p. 1, especially paragraph 9).

7 — Amongst those who have expressed such misgivings, see Lalive, 'L'immunité de juridiction des États et des Organisations internationales', in *R.C.A.D.I.*, 1953, III, p. 14 et seq., especially p. 301; and Professor Seidl-Hohenveldern, 'L'Immunité de juridiction et d'exécution des États et des Organisations internationales', in *I.H.E.I. Droit International-I*, Paris 1979/80, p. 109 et seq., particularly p. 166.

the Member States had of entrusting that activity to that organization after the signing of the Treaty of Rome. A factor that may be relevant in that regard is the general obligation incumbent on the Member States to refrain from adopting any measure that might reduce the effectiveness of the Treaty rules, specifically in competition matters. Just as it is not permissible for a Member State to have recourse to its own domestic law in order to limit the scope of Community law, since that would undermine the unity and effectiveness of Community law, so it would not be possible to arrive at a similar result by relying on the obligations arising from an international agreement, without prejudice of course to the specific provisions on the matter in the Treaty of Rome (Article 234) which are not relevant here. In other words, if national public bodies and Member States themselves, in so far as they carry on an economic activity, are under an obligation to respect the provisions of Article 85 et seq. of the Treaty, they may not escape that obligation by entrusting that activity to an international organization.

8. Eurocontrol claims further that the question submitted should in any case be declared inadmissible, as being vitiated by a material error concerning the tasks actually assigned to the organization by the Convention currently in force. Moreover — it adds — a judgment of the Court could not be applied by Eurocontrol, since any amendments to the rules which it might require would have to be adopted unanimously by the States belonging to the organization, and clearly those Contracting States which are not members of the Community would not be bound by the judgment of the Court.

Those points also miss their target. It will suffice to remark that, while some arguments are more concerned with the merits of the question, others do not take into consideration the fact that it is for the national court, under Article 177 of the Treaty, to assess with regard to the facts of the case whether a preliminary ruling is necessary in order to enable it to give its own judgment. Furthermore the Court cannot be denied jurisdiction because of possible inaccuracies in the order for reference relating to the description of the legal position in the dispute in the main proceedings, if the facts relating to the interpretation of Community law can be clearly deduced, as they can in the case in point, from the wording of the question drawn up by the national court and from all the information supplied by the latter.

Finally, the judgment of the Court is a judicial act that fits into the framework of the proceedings pending before the national court, which is bound therefore to abide by the interpretation of the Court. The judgment is not addressed to Eurocontrol: its possible repercussions on the fulfilment of the obligations imposed, under the Convention and Multilateral Agreement, on the Member State to which the court making the reference belongs, are on a completely different plane from that under consideration here.

9. If we now turn to the examination of the substance of the question submitted to the Court, on the basis of the aforesaid considerations concerning the possibility of subjecting Eurocontrol to the Community rules on competition, it is apparent that the essential factor in classifying a body as an undertaking is the pursuit of an economic activity capable of being carried on, at least in principle, by a private undertaking with a view to profit.

The pursuit of an activity that involves the exercise of official powers is, on the other hand, incompatible with that classification, with the result that a body acting as a public authority is not subject to the Treaty rules on competition. [8] In that connection it must be observed that, whilst the Court has preferred not to define that concept in abstract terms, the judgments that refer to it, [9] in the various areas of Community law in which that concept is relevant, follow the path marked out by Advocate General Mayras in his Opinion in the *Reyners* [10] case, according to whom 'official authority is that which arises from the sovereignty and majesty of the State; for him who exercises it, it implies the power of enjoying the prerogatives outside the general law, privileges of official power and powers of coercion over citizens'. The activities and duties concerned here include without doubt those relating to the fundamental powers of a public authority in areas such as general and fiscal administration, justice, security and national defence. On the other hand, although some of the tasks connected with the pursuit of an activity by a public authority in that capacity may be separated from the range of activities carried on by a particular body, the Treaty provisions on competition remain applicable to them. [11]

10. The problem at the heart of this case is therefore to establish the economic nature of the activity carried on by Eurocontrol.

Although the action pending before the Belgian Cour de Cassation concerns exclusively Eurocontrol's collection of route charges and not the supervision of air navigation to which those charges relate, the general scope of the question asked by the court making the reference also extends to the nature of such supervision; moreover, the salient features of that activity provide useful information for the purpose of defining the nature of the collection of charges. [12]

8 — See, for the same interpretation, the judgments in Case 118/85 *Commission* v *Italy* [1987] ECR 2599, in particular at paragraphs 6 and 7, and Case 30/87 *Bodson* v *Pompes funèbres des régions libérées SA* [1988] ECR 2479, in particular at paragraph 18. That principle could, moreover, already have been deduced from the judgment in Case 94/74 *Industria Gomma Articoli Vari* v *Ente Nazionale per la Cellulosa e per la Carta* [1975] ECR 699, in particular at paragraph 35.

9 — See, for example, on the right of establishment, the judgment in Case 2/74 *Reyners* v *Belgian State* [1974] ECR 631; on freedom of movement for workers, the judgments in Case 149/79 *Commission* v *Belgium* [1980] ECR 3881; Case 149/79 *Commission* v *Belgium* [1982] ECR 1845; Case 307/84 *Commission* v *France* [1986] ECR 1725; on the subject of VAT, the judgment in Joined Cases 231/87 and 129/88 *Ufficio distrettuale delle imposte dirette di Fiorenzuola d'Arda* [1989] ECR 3233.

10 — Judgment cited above in the preceding footnote.

11 — See, in this connection, the judgment in Case 107/84 *Commission* v *Germany* [1985] ECR 2655, especially at paragraphs 14 and 15.

12 — The activities carried on by Eurocontrol with a view to coordinating the navigation policies of the Member States, the non-economic nature of which is beyond dispute, are not relevant here.

11. In a case concerning the interpretation of the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, the Court effectively ruled out the idea that 'civil and commercial matters' might include proceedings between Eurocontrol and an air company for the recovery of sums payable by the latter as route charges. [13] On that occasion, the Court was able to rule on the nature of the activities carried on by Eurocontrol and it considered in particular that: 'Although certain judgments given in actions between a public authority and a person governed by private law may fall within the area of application of the Convention, this is not so where the public authority acts in the exercise of its powers. Such is the case in a dispute which... concerns the recovery of charges payable by a person governed by private law to a national or international body governed by public law for the use of equipment and services provided by such body, in particular where such use is obligatory and exclusive' and 'in particular where the rate of charges, the methods of calculation and the procedures for collection are fixed unilaterally in relation to the users [and]... the body in question unilaterally fixed the place of performance of the obligation at its registered office (...)'.

While this judgment provides some important criteria for the purposes of my analysis, it is not decisive, as the Commission has correctly pointed out. The obligatory and exclusive use of a body's facilities and services or the unilateral laying down of procedures for collection in relation to users are not of themselves sufficient to prevent an activity from being of an economic nature or subject to the rules of competition; if that were the case, public postal and telecommunications services, for instance, would have to be regarded as not being of an economic nature either. As we know, however, that is not so. [14]

12. Eurocontrol's control of air navigation within the limits of the air space of the Benelux countries and Northern Germany, under the terms of a specific agreement [15] concluded in accordance with the provisions of Article 2(2) of the Convention as amended, does not imply a transfer of powers to the international organization by the four signatory States; their intention was to entrust purely executive tasks to it.

Under the terms of Article 1 of that agreement, the contracting parties are to retain their powers and obligations in the field of aeronautic legislation with regard to the regulation and organization of air space, and in relations with other international organizations and the users of the services provided. The States concerned therefore determine the general scope of the tasks delegated by them and continue to supervise the procedures for carrying these out.

13 — Judgment in Case 29/76 *LTU* v *Eurocontrol* [1976] ECR 1541, especially at paragraph 4.

14 — See the judgments in Case 41/83 *Italy* v *Commission* [1985] ECR 873, and 107/84 *Commission* v *Germany* [1985] ECR 2655.

15 — The 'Agreement relating to the provision and operation of air traffic facilities and services by Eurocontrol at the Maastricht control centre' of 25 November 1986.

On the other hand, the essential requirements of air navigation control, carried out by Eurocontrol in ways and by means not dissimilar to those normally applied by the States concerned, are to guarantee the safety of passengers as well as of the populations of the territories flown over and, from the same point of view, to ensure the necessary coordination with the specific requirements of national defence. Such control, which is in various respects connected with the exercise of State sovereignty, thus constitutes a true function of air space supervision, which can only be pursued by a public authority, irrespective of the form chosen for its organization and management. Even where the provision of services relating to air navigation has been entrusted to a company governed by private law (as is the case in Germany) or has been organized according to forms typical of the private sector (as in the Netherlands, taking account of the tasks assigned in this case to Eurocontrol), the States in question, as is apparent from the research carried out by the relevant departments of the Court, retain absolute control of the company formed for that purpose, any transfer, even in part, of the company's capital being absolutely forbidden, or else they rule out in any case the total privatization of air safety operations, since it remains an essential duty of the State to perform them.

13. For the exercise of navigation control, moreover, powers have been conferred on Eurocontrol by the exercise of public authority, in particular the possibility of giving orders to aircraft captains that give rise to an obligation to comply therewith, except in cases of 'force majeure', and the possibility of establishing whether the regulations on air navigation have been infringed.

If it is true that the performance of duties involving the exercise of public authority by a body may prevent the range of activities carried on by it from being subject to the rules of competition only where those duties form an inseparable part of the activity in question, it seems to me that in the case in point the services provided (radar control, meteorological information, warning services) form an indissociable whole.

This leads me to the conclusion that air control constitutes a natural monopoly in the air space where it is carried out, and in that respect, competition between two bodies not only is not desirable but would not even be possible in practice. In the final analysis it is a public service to which any idea of commercial exploitation with a view to profit is alien: which may not be incompatible, where appropriate and given equal efficiency, with economic management of the activity in question.

Moreover, the fact that we are dealing with a service, not in the economic sense and provided principally for businesses (airline companies), but aimed at the community as a whole, seems to me to be confirmed by the observation made during the hearing and not

disputed by SAT, that control is exercised in respect of any aircraft, within the air space under the authority of Eurocontrol, irrespective of whether or not the owner has paid the route charges.

The contracting parties have therefore entrusted Eurocontrol with the collection of the charges since, even for users, the system is better managed when centralized than it would be if the airline companies were to be asked to make separate payments for international flights.

14. As regards the collection of the charges in question, it may suffice to point out that, once the non-economic nature of the service to which they relate has been established, collection must be regarded as having the same nature. I believe however that it would be useful to say a little more on this point in order to clarify Eurocontrol's role in that connection and the legal nature of the charges at issue.

Those charges, once an administrative rate to cover the expenses of collection has been deducted, [16] are paid in their entirety to the Member States, even for operations carried out from the Maastricht centre.

While therefore, as has already been stated, the formula for calculating the charges is determined by the Permanent Commission of the organization, the yearly amount of the charge is then in fact fixed by the Member States — even where they have entrusted to Eurocontrol the task of carrying out air control operations — since it is they who fix one of the essential elements of the formula, that is to say the national rate per unit. The difference between the rates applied is not therefore the result of independent action by Eurocontrol, but the consequence of the various policies pursued by the States in question — albeit on the basis of uniform principles — inasmuch as some of them may decide not to recover the whole of the costs incurred for facilities and services through the charges in question. Moreover, those charges undoubtedly constitute a tax burden, since they are a sort of financial contribution to the costs incurred by the States, payable by the individual for the benefit he has received, as a result of a specific administrative activity carried on chiefly in the interest of the community.

From the foregoing considerations it is clear that with regard to the collection of charges, Eurocontrol is not able to take any decisions independent of the will of the Contracting States and confines itself to fixing for every single flight the charge actually payable by, and to collecting it as a single debt from, the debtors. Since it acts therefore simply as collector for or agent of the Contracting States, it cannot, in carrying on that activity, be regarded as an undertaking within the meaning of the Community rules on competition. [17]

16 — The amount of the so-called administrative rate — which is moreover very small in comparison with the amount of the charge — has not been challenged in any way in the course of the main proceedings.

17 — See in this connection the judgments in Case 127/73 *BRT* [1974] ECR 313, and Joined Cases C-159/91 and C-160/91 *Poucet et Pistre* [1993] ECR I-637.

15. In the light of the considerations set out above, I therefore propose that the Court reply as follows to the question referred to it by the Belgian Cour de Cassation:

'An international body such as Eurocontrol, responsible for operating the air navigation control service on behalf of certain States, and also for the collection of route charges, as a mere agent of the Contracting States, is not an undertaking within the meaning of Articles 86 and 90 of the EEC Treaty.'